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No. 87-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILIP COOMBE, Superintendent of
Eastern Correctional Facility,

Petitioner,

—against—

ROBERT ESCALERA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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December 8, 1987

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ARGUMENT

The petition for certiorari in this case presents, among other issues, the question whether the lenient exhaustion standard first set forth by the Second Circuit in *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984), is inconsistent with the principles of federalism that underlie the exhaustion requirement. The defendant, Robert Escalera, argues in his brief in opposition to the certiorari petition that "this Court was asked to review *Daye* on certiorari when *Daye* was decided. The Court denied certiorari then and it should deny it now" (Brief in Opp. at 24). This argument rests on a plain misreading of the procedural history of *Daye*. The petition in *Daye* was filed not by the State but rather by the criminal defendant, who had prevailed in the

Second Circuit on the exhaustion issue and challenged only the merits of the decision. Thus, the exhaustion standard established by the Second Circuit in *Daye* was not before this Court on the certiorari petition in that case, and the denial of certiorari in *Daye* is utterly irrelevant to the certiorari petition in this case.

In *Daye v. Attorney General*, a panel of the Second Circuit initially held that *Daye* had failed to exhaust his state court remedies, and therefore affirmed the district court judgment dismissing his petition for habeas corpus. 663 F.2d 1155 (2d Cir. 1981). After rehearing the case en banc, the Second Circuit vacated the decision of the panel and remanded the appeal to the panel for consideration of the merits of the habeas petition. 696 F.2d 186 (2d Cir. 1982) (en banc). On remand, the panel rejected on the merits Daye's claim that the state trial judge's intervention in the conduct of the trial was unconstitutional, and therefore again affirmed the judgment of the district court. 712 F.2d 1566 (2d Cir. 1983). Daye then sought in this Court a writ of certiorari to review the judgment of the Second Circuit, and his petition for certiorari was denied. 464 U.S. 1048 (1984).

Contrary to the defendant's suggestion, the question whether the exhaustion rule established by the Second Circuit in *Daye* is correct was never presented to this Court by the petition for certiorari in that case. Daye could not possibly have sought to challenge in this Court the lenient exhaustion rule that redounded to his benefit by requiring the Second Circuit panel to reach the merits of his claim. Rather, Daye's certiorari petition sought to challenge only the panel's decision that rejected on the merits his claim of unconstitutional judicial intervention.

Moreover, the procedural posture of *Daye* is not unique, but in fact frequently recurs in the Second Circuit, insulating the *Daye* standard from review in this Court. When the Second Circuit concludes under *Daye* that a state prisoner seeking federal habeas corpus relief has exhausted state remedies, and

then rejects the prisoner's claims on the merits, the State is not aggrieved by the ultimate ruling and therefore cannot seek further review. *See Garofolo v. Coomb*, 804 F.2d 201, 206 (2d Cir. 1986); *Jackson v. Scully*, 781 F.2d 291, 294-95 (2d Cir. 1986); *Harris v. Scully*, 779 F.2d 875, 877-78 (2d Cir. 1985); *Gayle v. Scully*, 779 F.2d 802, 803-04, 805 n. 1 (2d Cir. 1985), *cert. denied*, 107 S. Ct. 139 (1986); *Johnson v. Scully*, 727 F.2d 222, 224 (2d Cir. 1984). But in such cases the State is nonetheless aggrieved by the unwarranted intrusion of the federal courts into the review of state criminal convictions. Moreover, the harm in those cases is inflicted not merely or even principally on the State as a litigant, but also on the federal judiciary, which spends precious judicial resources analyzing and deciding claims that should be relegated to state court.

Even if *Daye* never led the federal courts to set aside a single state conviction, it would thus interfere with the proper allocation of work between the state and federal courts, and do violence to the delicate fabric of federalism.

For that reason, as well as for the other reasons stated in the petition, it is especially important for this Court to grant the State's petition for certiorari, confine the federal courts to their proper role on habeas corpus review of state convictions, and reverse the judgment below.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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